

**THE NOVA SCOTIA FREEDOM OF INFORMATION  
AND PROTECTION OF PRIVACY ACT**

**A REQUEST FOR REVIEW** of a decision of **DALHOUSIE UNIVERSITY** to deny access to documents related to an investigation of a complaint.

**REVIEW OFFICER:** Darce Fardy

**REPORT DATE:** April 2<sup>nd</sup>, 2003

**ISSUE:** Whether Sections 20, 16 and 14(1) support the decision to deny access to records.

In a Request for Review, in accordance with the **Freedom of Information and Protection of Privacy Act**, dated December 16, 2002, the Applicant asked that I recommend that Dalhousie University disclose all of the information he is seeking.

The Applicant had asked for copies of all documents related to an investigation into a complaint lodged against him, which was carried out by Dalhousie's Chief of Security. The Applicant was provided with copies of the letters of complaint and some notes concerning an interview with him. The Applicant was also given partial access to other documents with the names of third parties removed. He was denied, in their entirety, copies of other memoranda and faxes and notes from interviews with third parties. These documents were denied under **Sections 14(1)** - advice to a public body; **16** - solicitor-client privilege, and **20(1)** - unreasonable invasion of personal privacy.

During the mediation process, the number of documents to be considered was reduced and only the documents that were fully withheld remain at issue for this review. There are 44 of them.

In accordance with **Section 38** of the **Act** I have been provided with all relevant documents.

*Submission of Dalhousie to the Review Office:*

Dalhousie explained that three of the withheld documents contain advice which was provided to the Chief of Security by the Associate Director, Public Services/Staff Relations whose job it is to provide labour relations and employment advice to other managers at Dalhousie. Of the three, two were said to contain advice from the University's Associate Legal Counsel and are therefore privileged.

Dalhousie believes the remainder of the documents are denied because they contain "personal information" as defined in **Section 3(1)(i)** of the **Act**.

Dalhousie chose part (d) of subsection 20(3) ("employment history") to support its view that disclosing the personal information in the documents would constitute an unreasonable invasion of the personal privacy of third parties. Two of the documents, according to Dalhousie, contain no personal information of the Applicant. It took the position that the records contain personal information of an individual other than the Applicant and should be denied because they were provided in confidence [see s.20(2)(f)].

Having reached that conclusion Dalhousie reviewed the factors found in subsection 20(2) and considered part (f): "the personal information has been supplied in confidence"; and part

(h): “the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant”.

Dalhousie believes that because many of the documents contain the personal information of other parties, it would not be practicable to separate the personal information of the Applicant. As well, it said:

Disclosure of these documents would violate the confidentiality promised to the interviewees .... and will severely compromise Dalhousie’s future ability to address employee related concerns... Dalhousie would never be in a position to guarantee confidentiality.

Dalhousie also concluded that in weighing the balance between the right of the Applicant ( against whom there is no proceeding pending) to his own personal information and its obligations to protect the personal privacy of his co-workers, the balancing favoured Dalhousie’s obligation to the co-workers.

The sections cited by Dalhousie with respect to personal information are underlined below:

**Personal information**

**20 (1)** The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

**(2)** In determining pursuant to subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Nova Scotia or a public body to public scrutiny;

- (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment;
- (c) the personal information is relevant to a fair determination of the applicant's rights;
- (d) the disclosure will assist in researching the claims, disputes or grievances of aboriginal people;
- (e) the third party will be exposed unfairly to financial or other harm;
- (f) the personal information has been supplied in confidence;
- (g) the personal information is likely to be inaccurate or unreliable; and
- (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

**(3)** A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

- (a) the personal information relates to a medical, dental, psychiatric, psychological or other health-care history, diagnosis, condition, treatment or evaluation;
- (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
- (c) the personal information relates to eligibility for income assistance or social-service benefits or to the determination of benefit levels;
- (d) the personal information relates to employment or educational history;
- (e) the personal information was obtained on a tax return or gathered for the purpose of collecting a tax;
- (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations;

(h) the personal information indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations; or

(i) the personal information consists of the third party's name together with the third party's address or telephone number and is to be used for mailing lists or solicitations by telephone or other means.

**(4)** A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(a) the third party has, in writing, consented to or requested the disclosure;

(b) there are compelling circumstances affecting anyone's health or safety;

(c) an enactment authorizes the disclosure;

(d) the disclosure is for a research or statistical purpose and is in accordance with Section 29 or 30;

(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;

(f) the disclosure reveals financial and other similar details of a contract to supply goods or services to a public body;

(g) the information is about expenses incurred by the third party while travelling at the expense of a public body;

(h) the disclosure reveals details of a licence, permit or other similar discretionary benefit granted to the third party by a public body, not including personal information supplied in support of the request for the benefit; or

(i) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body, not including personal information that is supplied in support of the request for the benefit or is referred to in clause (c) of subsection (3).

(5) On refusing, pursuant to this Section, to disclose personal information supplied in confidence about an applicant, the head of the public body shall give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.

(6) The head of the public body may allow the third party to prepare the summary of personal information pursuant to subsection (5).

**Conclusions:**

An investigation such as the one involved in this case would normally require ‘advice’ and ‘legal advice’. I am satisfied the documents numbered 29, 31 and 32 contain information that may be exempted from disclosure by s.14(1) and s.16.

I agree with Dalhousie that much of the information being sought by the Applicant is “personal information” as defined in s.3(1)(i). However, any opinions expressed about the Applicant is his own personal information to which he has a right of access.

When determining whether a disclosure of personal information would constitute an unreasonable invasion of personal privacy, it is necessary for a public body to consider whether the personal information falls within ss.20(4). If it does then disclosure would not be an unreasonable invasion of personal privacy and a public body would be obliged to disclose. Subsections.20(2) and 20(3) would not need to be considered. I have found s.20(4) does not apply.

Dalhousie finds support for its decision in ss.20(3)(d) (employment history). I disagree. In my Review *FI-02-84* I said that with respect to this clause:

I have adopted the view of the Ontario Information and Privacy Commissioner that the term ‘refers only to past employment and not to aspects of current employment such as an employee’s current salary or job position’ (Order R 980015).

In *Dickie v. Nova Scotia (Department of Health)* [1999] N.S.J. No. 116, the Nova Scotia Court of Appeal said the words ‘employment history’ and the context in which they were used in the Act ‘suggest that the ordinary meaning of the words in the employment context is intended. In the employment context, employment history is used as a broad and general term to cover an individual’s work record’.

In my Reviews *FI-01-100* and *FI-98-81* I cited the British Columbia Information and Privacy Commissioner who, in Order P-1180, “interpreted ‘employment history’ to mean what individuals did in their workplace on particular projects, not to their behavior, but to their tangible activities in the workplace, such as research projects and related activities”.

Given that s.20 is a mandatory exemption I examined other circumstances in ss.20(3) particularly part (g) which Dalhousie did not cite. I concluded, as I did in *FI-01-100* that:

‘personal recommendations’ and ‘evaluations’ are generally offered by a supervisor in managing staff. It does not apply, in my view, to the results of an investigation such as the one I am dealing with in this Review. This view enjoys the support of the *Dickie* appeal in which the court said that the terms used in s.20(3)(g) ‘relate to types of documents which are common in the hiring and ongoing evaluation of employees’. The Appeal judge agreed with the Supreme Court judge that the language of that subsection ‘does not contemplate disciplinary investigations or recommendations made as a result of them’.

I conclude there is nothing in s.20(3) that would lead one to presume that disclosure of the records at issue here would constitute an “unreasonable invasion of the personal privacy” of the third parties.

This leaves the factors of ss.20(2) to be considered. It is my view that

- (a) disclosure is not desirable for the purpose of subjecting Dalhousie to public scrutiny. This case involves a matter of no public concern or interest;
- (b) disclosure will be nothing to promote public health and safety or the protection of the environment;
- (c) the personal information is not relevant to a fair determination of the applicant's rights. As noted above there is no proceedings pending against the Applicant;
- (e) the third party is unlikely to be exposed unfairly to financial or other harm by the disclosure of the personal information;
- (f) **it is clear that the personal information was provided in confidence;**
- (g) the personal information is part of witness statements and statements by the investigator. The Applicant may not agree with the contents of the statements but this would not mean that the statements are inaccurate or unreliable;
- (h) **in my view, disclosure could unfairly damage the reputation of at least one of the individuals involved.**

In the absence of any representations from the Applicant to support disclosure, I conclude that the disclosure of the third parties' personal information contained in the documents would be an unreasonable invasion of their personal privacy. In my view, the factors found in s.20(2)(f) and (h) favour withholding the personal information of the third parties.

**Section 5(2)** of the **Act** requires a public body to sever exempt information from a document and provide the remainder to an applicant, “if that information can reasonably be severed”.

In this case I am satisfied that the documents in dispute cannot be reasonably severed. Because the documents contain a mix of personal information about different parties, successful severing would be difficult.

However, subsection 20(5) requires a public body when denying access to personal information supplied in confidence **about the Applicant** to provide a summary when personal information is denied.

**Recommendation:**

That Dalhousie provide the Applicant with a summary of the information in the documents denied under s.20.

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**Section 40** requires Dalhousie to make a decision on this recommendation within 30 days of receiving this Report and to notify the Applicant and the Review Officer, in writing, of that decision.

**Dated** at Halifax, Nova Scotia this 2<sup>nd</sup> day of April, 2003.

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Darce Fardy, Review Officer

